PT 96-1
TAX TYPE: PROPERTY TAX
ISSUE: GOVERNMENT OWNERSHIP/USE

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

	)	Des Plaines Oasis
	)	PIN 08-25-400-010-8002
THE ILLINOIS STATE TOLL	)	DOCKET NOS. 88-16-563; 89-16-1281;
HIGHWAY AUTHORITY	)	90-16-1750; 91-16-964;
	)	92-16-1530
APPLICANT	)	
	)	O'Hare Oasis
	)	PINS 12-16-315-017-8002
	)	12-21-100-013-8002
V.	)	DOCKET NOS. 88-16-565; 88-16-568;
	)	89-16-1279; 89-16-1280;
	)	90-16-1749; 92-16-1544
	)	
	)	Hinsdale Oasis
	)	PIN 18-18-102-006-8002
THE DEPARTMENT OF	)	DOCKET NOS. 88-16-561; 89-16-1278;
REVENUE OF THE STATE	)	90-16-881; 91-16-923;
OF ILLINOIS	)	92-16-1531
	)	
	)	Abraham Lincoln Oasis
	)	PINS 29-27-211-030-8002
	)	29-27-402-014-8002
	)	DOCKET NOS. 88-16-569; 88-16-570;
	)	89-16-1276; 89-16-1277;
	)	90-16-1514; 91-16-934;
	)	92-16-1529

RECOMMENDATION FOR DISPOSITION

Appearances: MR. JOHN E. WHITE, SPECIAL ASSISTANT ATTORNEY GENERAL, ON BEHALF OF THE ILLINOIS DEPARTMENT OF REVENUE; ROBIN L. WOLKOFF AND CRAIG M. WHITE, ON BEHALF OF THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY AND WENDY'S INTERNATIONAL, INC.; JAMES R. FIGLIULO, ON BEHALF OF MCDONALD'S CORPORATION; MARILYN WETHEKAM, ON BEHALF OF MOBIL OIL CORPORATION; CHARLES A. POWELL, ON BEHALF OF MARRIOTT CORPORATION; JOHN M. IZZO, ON BEHALF OF LAGRANGE HIGHLANDS SCHOOL DISTRICT NO. 106 AND THORNTON TOWNSHIP SCHOOL DISTRICT NO. 205, INTERVENORS; RUSSELL T. PAARLBERG, ON BEHALF OF SOUTH HOLLAND SCHOOL DISTRICT NO. 150, INTERVENOR; EDWARD J. KING, ON BEHALF OF LYONS TOWNSHIP, INTERVENOR; DAVID R. WILTSE, ON BEHALF OF THE CITY OF DES PLAINES, INTERVENOR; ELIZABETH D. SANTIS, ON BEHALF OF THE VILLAGE OF HINSDALE, INTERVENOR; PAUL A. MILLICHAP, ON BEHALF OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT 59, LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204, LEYDON HIGH SCHOOL DISTRICT 212 AND ARLINGTON HEIGHTS TOWNSHIP HIGH SCHOOL DISTRICT 214, INTERVENORS.

Synopsis:

HEARINGS WERE HELD IN THESE MATTERS ON APRIL 24, AND 25, 1995, AT 100 WEST RANDOLPH STREET, CHICAGO, ILLINOIS.

ON JULY 17, 1991, AN ADMINISTRATIVE HEARING WAS HELD BEFORE THE DEPARTMENT ON THE DENIAL OF THE APPLICANT'S REQUESTS FOR EXEMPTION FROM REAL ESTATE TAXES FOR THE 1988 ASSESSMENT YEAR FOR THE PARCELS IN ISSUE. THE DIRECTOR OF REVENUE ISSUED A FINAL ADMINISTRATIVE DECISION IN THAT MATTER ON OCTOBER 29, 1991. THE APPLICANT THEN FILED FOR ADMINISTRATIVE REVIEW, UNDER THE PROVISIONS OF ILL. REV. STAT., CH. 110, PARA. 3-101 ET SEQ. (NOW CITED AS 735 ILCS 5/3-101 ET SEQ.)

ON AUGUST 30, 1994, PURSUANT TO AN AGREED ORDER AND STIPULATION, THIS MATTER WAS REMANDED TO THE DEPARTMENT FOR THE PURPOSE OF VACATING THE ADMINISTRATIVE DECISION, AND CONDUCTING A HEARING DE NOVO, WITH ADDITIONAL PARTIES AND ISSUES. IN FURTHERANCE OF THE REMAND ORDER, A STATUS CONFERENCE WAS SET FOR OCTOBER 26, 1994. AT THAT CONFERENCE, THE DEPARTMENT MOVED TO CONSOLIDATE THE 1988 APPLICATIONS FOR EXEMPTION FOR THE PARCELS IN QUESTION WITH THE 1989, 1990, 1991 AND 1992 APPLICATIONS FOR EXEMPTION FOR SAID PARCELS, WHICH WERE THEN PENDING BEFORE THE

DEPARTMENT. ON DECEMBER 5, 1994 AND MARCH 15, 1995, RESPECTIVE ORDERS WERE ENTERED GRANTING THE MOTION TO CONSOLIDATE AND ADDING MOBIL OIL CORPORATION ("MOBIL"), AND MARRIOTT CORPORATION ("MARRIOTT"), AS PARTIES TO THE PROCEEDING.

PRESENT AT THE HEARING AND TESTIFYING IN THIS MATTER WERE MR. JOHN CANNIFF, BUILDING MAINTENANCE MANAGER, MR. JAMES DAVERN, SENIOR INSPECTOR, AND MR. NICHOLAS W. JANNITE, CHIEF OF FINANCE AND ADMINISTRATION FOR THE ILLINOIS TOLL HIGHWAY AUTHORITY ("APPLICANT" OR "ITHA"). ALSO PRESENT AND TESTIFYING FOR MCDONALD'S CORPORATION ("MCDONALD'S"), WAS MR. JOSEPH THOMAS, A DEPARTMENT DIRECTOR IN THE REAL ESTATE LEGAL DEPARTMENT OF THAT COMPANY.

PRIOR TO THE HEARING, THE PARTIES STIPULATED THAT ITHA OWNED THE PARCELS OF REALTY WHICH ARE THE SUBJECT OF THE PROCEEDINGS, AS WELL AS THE BUILDINGS AND PARKING LOTS LOCATED THEREON DURING THE APPLICABLE PERIODS. AT ISSUE THEN IS THE QUESTION OF WHETHER THE OPERATING AGREEMENTS BETWEEN THE ITHA AND WENDY'S, MCDONALD'S, MARRIOTT AND MOBIL, CONSTITUTE LEASES, THEREBY SUBJECTING THE PROPERTIES TO TAXATION UNDER STATUTORY PROVISIONS OF THE TOLL HIGHWAY ACT AND THE REVENUE ACT OF 1939 (THE REVENUE ACT), DURING THE 1988 THROUGH 1992 ASSESSMENT YEARS.

FOLLOWING THE SUBMISSION OF ALL OF THE EVIDENCE AND A REVIEW OF THE RECORD, IT IS DETERMINED THAT THE AGREEMENTS IN EFFECT BETWEEN THE PARTIES ARE LEASES, WHICH IN TURN SUBJECT THE VARIOUS CORPORATIONS TO TAXATION ON THE PROPERTY LEASED.

Findings of Fact:

1. THE ITHA IS AN ADMINISTRATIVE AGENCY OF THE STATE OF ILLINOIS, PURSUANT TO THE TOLL HIGHWAY ACT, 605 ILCS 10/1 ET SEQ. (FORMERLY ILL. REV.

STAT. CH. 121, PARAGRAPHS 100-1 ET SEQ.). IT IS AUTHORIZED TO CONSTRUCT, OPERATE, REGULATE, AND MAINTAIN A SYSTEM OF TOLL HIGHWAYS IN ILLINOIS. ID. (DEPT. PROP. FINDING NO. 1)[1]

2. THE ITHA IS AUTHORIZED BY STATUTE TO CONTRACT WITH OTHERS TO PROVIDE SERVICE STATIONS, STORES, AND RESTAURANT FACILITIES AT OASES, WHICH ARE PART OF THE TOLL HIGHWAY SYSTEM. (STIP. EX. NO. 60, PARA. 11); (DEPT. PROP. FINDING NO. 1)

3. THE ITHA IS THE SOLE OWNER OF THE LAND AND IMPROVEMENTS INCLUDED IN THE PARCELS HERE IN ISSUE. (STIP. EX. NO. 60, PARA. 5)

4. ITHA'S OWNERSHIP INTEREST IN THESE PARCELS IS EXEMPT FROM REAL ESTATE TAX PURSUANT TO THE TOLL HIGHWAY ACT. 605 ILCS 10/22.

5. COOK COUNTY PARCEL NO. 08-25-400-010-8002 IS A LEASEHOLD PARCEL LOCATED IN ELK GROVE TOWNSHIP. THIS PARCEL IS HEREINAFTER REFERRED TO AS THE "DES PLAINES OASIS". (STIP. EX. NO. 60, PARA. 1)

6. BY THE APPLICANT'S OWN CALCULATIONS, THE DES PLAINES OASIS INCLUDES APPROXIMATELY 38.3 ACRES. THE RESTAURANT BUILDING AT THAT OASIS COMPRISES 0.4 OF AN ACRE, AND THE SERVICE STATION FACILITIES THERE COMPRISE 0.7 OF AN ACRE OF SAID 38.3 ACRES. (STIP. EX. NO. 60, PARA. 20)

7. COOK COUNTY PARCELS NUMBERED 12-16-315-017-8002 AND 12-21-100-013-8002 ARE LEASEHOLD PARCELS LOCATED IN LEYDEN TOWNSHIP. THESE PARCELS ARE HEREINAFTER REFERRED TO AS THE "O'HARE OASIS". (STIP. EX. NO. 60, PARA. 2)

8. BY THE APPLICANT'S OWN CALCULATIONS, THE O'HARE OASIS INCLUDES 34.2 ACRES. THE RESTAURANT BUILDING AT THAT OASIS COMPRISES 0.4 OF AN ACRE,

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[1]. FOLLOWING THE HEARING IN THIS CAUSE, THE PARTIES WERE PERMITTED TO SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW. THE DEPARTMENT WAS THE ONLY PARTY TO SUBMIT SUCH PROPOSED FINDINGS.

AND THE SERVICE STATION FACILITIES COMPRISE 0.7 OF AN ACRE OF SAID 34.2 ACRES. (STIP. EX. NO. 60, PARA. 21)

9. COOK COUNTY PARCEL NO. 18-18-102-006-8002 IS A LEASEHOLD PARCEL LOCATED IN LYONS TOWNSHIP. THIS PARCEL IS HEREINAFTER REFERRED TO AS THE "HINSDALE OASIS". (STIP. EX. NO. 60, PARA. 3)

10. BY THE APPLICANT'S OWN CALCULATIONS, THE HINSDALE OASIS CONTAINS APPROXIMATELY 46.7 ACRES. THE RESTAURANT BUILDING AT THAT OASIS COMPRISES 0.4 OF AN ACRE, AND THE SERVICE STATION FACILITIES COMPRISE 0.7 OF AN ACRE. (STIP. EX. NO. 60, PARA. 22)

11. COOK COUNTY PARCELS NUMBERED 29-27-211-030-8002 AND 29-27-402-014-8002, ARE LEASEHOLD PARCELS LOCATED IN THORNTON TOWNSHIP. THESE PARCELS ARE HEREINAFTER REFERRED TO AS THE "ABRAHAM LINCOLN OASIS". (STIP. EX. NO. 60, PARA. 4)

12. BY THE APPLICANT'S OWN CALCULATIONS, THE ABRAHAM LINCOLN OASIS INCLUDES APPROXIMATELY 28.8 ACRES. THE RESTAURANT BUILDING AT THAT OASIS COMPRISES APPROXIMATELY 0.4 OF AN ACRE, AND THE SERVICE STATION FACILITIES COMPRISE APPROXIMATELY 0.3 OF AN ACRE. (STIP. EX. NO. 60, PARA. 23)

13. DURING THE APPLICABLE YEARS, MOBIL OPERATED THE SERVICE STATION FACILITIES AT EACH OF THESE OASES. (STIP. EX. NO. 60, PARA. 15)

14. THE ORIGINAL OPERATING AGREEMENT BETWEEN THE ITHA AND MOBIL WAS DATED NOVEMBER 5, 1985. THE TERM OF THAT AGREEMENT WAS FROM NOVEMBER 10, 1985 THROUGH DECEMBER 1, 1987. SAID OPERATING AGREEMENT WAS EXTENDED BY MUTUAL AGREEMENT THROUGH DECEMBER 1, 1988, AND SUBSEQUENTLY RENEWED THROUGH NOVEMBER 30, 1991. MOBIL AND THE APPLICANT THEN ENTERED INTO ANOTHER OPERATING AGREEMENT ON DECEMBER 1, 1991. THE TERM OF THE 1991 OPERATING AGREEMENT FOR THE FOUR COOK COUNTY OASES

which are the subject of this hearing expired during September, October, or November 1994. (Stip. Ex. No. 60, Para. 15)

15. Wendy's International, Inc. ("Wendy's") entered into a restaurant operating agreement with the ITHA for the Hinsdale Oasis on September 17, 1984. The term of said operating agreement was from November 7, 1984 to November 6, 1994. (Stip. Ex. No. 60, Para. 12)

16. McDonald's entered into a restaurant operating agreement with the ITHA for the Des Plaines Oasis on September 21, 1984. The term of said operating agreement was from September 21, 1984 through September 20, 1994. (Stip. Ex. No. 5)

17. Said operating agreement was amended by Amendment No. 1 to Operating Agreement dated March 12, 1987. (Stip. Ex. No. 7)

18. Marriott has operated restaurants at the Abraham Lincoln Oasis and the O'Hare Oasis during these assessment years, pursuant to an operating agreement between the ITHA and Howard Johnson Company entered into on November 1, 1984. The term of said operating agreement was from November 1, 1984 through October 31, 1994. (Stip. Ex. No. 60, Para. 13)

19. All of the operating agreements discussed above contain a provision which states, in part, as follows:

> This operating agreement is personal to the operator and may not be assigned in whole or in part, nor shall any rights or privileges herein granted be sold, transferred or assigned." (Paragraph 10(f) of Stip. Ex. Nos. 1, 5, 12, 15, & 16, and Paragraph 10(e) of Stip. Ex. No. 17).

20. All of the operating agreements contain the following provision, to wit:

<u>Successors and Assigns</u>

> THE AGREEMENT SHALL BE BINDING UPON THE AUTHORITY AND THE OPERATOR, THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, BUT NOTHING CONTAINED IN THIS SECTION SHALL AFFECT THE RESTRICTION UPON ASSIGNABILITY CONTAINED IN SECTION 10(F). (PARAGRAPH 36 OF STIP. EX. NOS. 1, 5, & 12; PARAGRAPH 37 OF STIP. EX. NOS. 15, 16, & 17).

21. THE "SUCCESSORS AND ASSIGNS" PROVISION OF EACH OPERATING AGREEMENT SPECIFICALLY CREATES RESTRICTIONS, AND NOT AN ABSOLUTE PROHIBITION, UPON AN OPERATOR'S ABILITY TO ASSIGN TO OTHERS THE RIGHTS AND PRIVILEGES GRANTED TO THE OPERATOR, PURSUANT TO THE OPERATING AGREEMENT.

22. EACH OPERATING AGREEMENT SPECIFICALLY IDENTIFIES THE PROPERTY TO WHICH THE OPERATORS ARE GRANTED RIGHTS DURING THE TERM OF THE AGREEMENT. (STIP. EX. 1, WENDY'S O/A, EXHIBITS A-1, A-2, & A-3; STIP. EX. NO. 5, MCDONALD'S O/A, EXHIBITS A-1, A-2, & A-3; STIP. EX. NO. 12, HOWARD JOHNSON'S O/A, EXHIBITS A-1, A-2, & A-3; STIP. EX. NO. 15, MOBIL O/A NO. 1, EXHIBITS A-2, A-4, A-5, & A-7; STIP. EX. NO. 16, MOBIL O/A NO. 2, EXHIBITS A-2, A-4, A-5 & A-7; STIP. EX. NO. 17, MOBIL O/A NO. 3, EXHIBITS A-2, A-4, A-5, & A-7); (DEPT. PROP. FINDING NO. 44)

23. THE BOUNDARIES OF EACH OASIS OVER WHICH AN OPERATOR HAS CONTROL AND RESPONSIBILITY ARE SPECIFICALLY IDENTIFIED IN THE EXHIBITS TO THE OPERATING AGREEMENTS. (TR. PP. 103-105)

24. EACH AGREEMENT GRANTS THE RESTAURANT OPERATOR THE RIGHT AND PRIVILEGE TO POSSESS, AND/OR DUTY TO OCCUPY (I.E., REMAIN ON THE PREMISES 24 HOURS A DAY, EVERY DAY DURING THE TERM OF THE AGREEMENT) THE RESTAURANT BUILDING AND/OR USE OTHER PORTIONS OF THE OASIS PROPERTY. (STIP. EX. 1, WENDY'S O/A, PARAS. 2, 6(A), 6(B); STIP. EX. 5, MCDONALD'S O/A, PARAS. 2, 6(A), 6(B); STIP. EX. 12, HOWARD JOHNSON'S O/A, PARAS. 2, 6(A), 6(B))

this requirement of constant operation does not merely connote premises use, but also physical retention and control.

25. The restaurant operators are required to provide food and related services 24 hours of every day during the term of the agreement. (paragraph 6(a) of the respective operating agreements)

26. Each restaurant operator is required to have an individual responsible for making operational decisions for the operator on the premises at all times. (paragraph 6(b) of the respective operating agreements)

27. The exhibits attached to each of the restaurant operator's agreements indicate parking lots to be used by the operators' employees. (ex. a-1).

28. Exhibit a-2, attached to each of the restaurant operator's agreements, indicates the area where the operator is responsible for policing trash and litter.

29. Exhibit a-3 to each of the restaurant operator's agreements indicates the area for which the operator is responsible for ice and snow removal.

30. The mobil operating agreements similarly grant to mobil the right and privilege to use, possess, and/or duty to occupy (i.e., remain on the premises 24 hours a day, every day during the term of the agreement) the service station areas at the oases and/or use other portions of the oasis property. (stip. ex. nos. 15, 16, & 17, paras. 2, 6(a) & 6(b), and exhibits a-2, a-4, a-5, & a-7); (dept. prop. finding no. 46)

31. Each operating agreement specifically identifies the compensation each operator is to pay to the itha pursuant to the agreement. (stip. ex. no. 1, wendy's o/a, para. 9; stip. ex. no. 5, mcdonald's

O/A, PARA. 9; STIP. EX. NO. 12, HOWARD JOHNSON O/A, PARA. 9; STIP. EX. NOS. 15, 16, & 17, MOBIL O/A, PARA. 9)

32. MOBIL PAYS THE ITHA BASED ON A SET AMOUNT OF CENTS PER GALLON ON ALL MOTOR FUEL GALLONS DELIVERED TO THE THIRTEEN SERVICE STATIONS LOCATED ON THE APPLICANT'S SEVEN OASES. (STIP. EX. NO. 15, MOBIL O/A, PARA. 9, 10.17 CENTS PER GALLON DELIVERED, WITH A GUARANTEED MINIMUM ANNUAL PAYMENT OF $1,156,000.00; STIP. EX. NO. 16, MOBIL O/A, PARA. 9, 10.26 CENTS PER GALLON DELIVERED, WITH A GUARANTEED MINIMUM ANNUAL PAYMENT OF $2,600,000.000; STIP. EX. NO. 17, MOBIL O/A, PARA. 9, 8.21 CENTS PER GALLON DELIVERED, WITH A GUARANTEED MINIMUM ANNUAL PAYMENT OF $1,900,000.00)

33. EACH RESTAURANT OPERATOR PAYS EITHER A FIXED ANNUAL AMOUNT TO THE ITHA IN MONTHLY INSTALLMENTS, OR, IF THE OPERATOR'S GROSS SALES EXCEED A CERTAIN LEVEL, IT PAYS A PERCENTAGE OF ITS GROSS SALES. (STIP. EX. NO. 1, WENDY'S O/A, PARA. 9; STIP. EX. NO. 5, MCDONALD'S O/A, PARA. 9; STIP. EX. NO. 12, HOWARD JOHNSON'S O/A, PARA. 9)

34. WENDY'S PAYS THE ITHA A MINIMUM MONTHLY AMOUNT OF $22,483.00 FOR THE RESTAURANT, GIFT SHOP, FLORAL BOUTIQUE, AND OTHER OPERATIONS AT THE HINSDALE OASIS. (STIP. EX. NO. 1, WENDY'S O/A, PARAS. 9(A)(1), & (2)). IF GROSS SALES EXCEED A CERTAIN LEVEL, WENDY'S PAYS 9% OF ITS GROSS RESTAURANT SALES, 15% OF ITS GROSS VENDING AND GIFT SHOP SALES, AND 10% OF ITS GROSS SALES FROM THE FLORAL BOUTIQUE. (STIP. EX. NO. 1, WENDY'S O/A, PARAS. 9(A)(3) & (4))

35. MCDONALD'S PAYS THE ITHA A MINIMUM MONTHLY AMOUNT OF $20,667.00 FOR THE RESTAURANT AND GIFT SHOP OPERATIONS AT THE DES PLAINES OASIS. (STIP. EX. NO. 5, MCDONALD'S O/A, PARAS. 9(A)(1) & (2)) IF ITS GROSS SALES EXCEED A CERTAIN LEVEL, MCDONALD'S PAYS THE APPLICANT 9% OF GROSS RESTAURANT SALES AT THE DES PLAINES OASIS, PLUS 9% OF GROSS GIFT SHOP

SALES, PLUS 9% OF GROSS VENDING MACHINE SALES. (STIP. EX. NO. 5, MCDONALD'S O/A, PARAS. 9(A)(3) & (4))

36. MARRIOTT PAYS THE ITHA A MINIMUM MONTHLY RENT OF $28,334.00 FOR THE RESTAURANT AND GIFT SHOP OPERATIONS AT THE LINCOLN AND O'HARE OASES. (STIP. EX. NO. 12, HOWARD JOHNSON'S O/A, PARAS 9(A)(1) & (2)) IF THE GROSS SALES EXCEED A CERTAIN LEVEL, MARRIOTT PAYS 9 1/4% OF GROSS RESTAURANT, GIFT SHOP, AND VENDING MACHINE SALES AT BOTH OASES. (STIP. EX. NO. 12, HOWARD JOHNSON'S O/A, PARAS. 9(A)(3), (4), & (5))

37. EACH OF THE OPERATING AGREEMENTS CONTAINS A PROVISION CONCERNING REAL ESTATE TAXES. IN THE CASE OF THE OPERATING AGREEMENTS WITH THE RESTAURANT OPERATORS, IT IS FOUND IN PARAGRAPH 25. IN THE MOBIL OPERATING AGREEMENTS, IT IS FOUND IN PARAGRAPH 26.

38. THIS REAL ESTATE TAX CLAUSE READS AS FOLLOWS:

> IT IS NOT PRESENTLY CONTEMPLATED BY THE PARTIES THAT ANY OF THE PREMISES WILL BE SUBJECT TO REAL PROPERTY TAXES OR THEIR EQUIVALENT. HOWEVER, IN THE EVENT THAT THE PREMISES, OR ANY PART THEREOF, OR OPERATOR'S INTEREST THEREIN, POSSESSORY OR OTHERWISE, SHALL BE MADE SUBJECT TO ANY REAL PROPERTY TAX (OF WHATEVER KIND AND HOWEVER DENOMINATED), THE AUTHORITY SHALL PAY OR DISCHARGE, OR CAUSE TO BE PAID OR DISCHARGED, SUCH TAX OR ASSESSMENT.

39. THE OPERATORS ARE RESPONSIBLE NOT ONLY TO PAY FOR ALL UTILITIES FOR THE AREAS UNDER THEIR CONTROL, BUT ALSO ARE RESPONSIBLE FOR CONTRACTING WITH THE ELECTRIC UTILITIES FOR THEIR ELECTRIC SERVICE. (STIP. EX. NO. 1, WENDY'S O/A, PARA. 8; STIP. EX. NO. 5, MCDONALD'S O/A, PARA. 8; STIP. EX. NO. 12, HOWARD JOHNSON'S O/A, PARA. 8; STIP. EX. NO. 15, 16, & 17, MOBIL O/A, PARA. 8)

40. THE OPERATORS ARE ALSO RESPONSIBLE TO MAINTAIN SUCH FIXED BUILDING ITEMS AS THE PLUMBING, HVAC, DRAIN LINES, EXHAUST FANS, GLASS, ETC. (STIP. EX. NO. 1, WENDY'S O/A, PARA. 14(I)(2); STIP. EX. NO. 5, MCDONALD'S O/A,

PARA. 14(I)(2); STIP. EX. NO. 12, HOWARD JOHNSON'S O/A, PARA. 14(I)(2); STIP. EX. NO. 15, MOBIL O/A, PARA. (1)4(H)(2); STIP. EX. NO. 16, MOBIL O/A, PARA. 14(G)(2); STIP. EX. NO. 17, MOBIL O/A, PARA. 14(H)(2))

41. THE APPLICANT APPROVED THE FOLLOWING AGREEMENTS ENTERED INTO BY WENDY'S:

A) THE 11/24/84 OPERATING AGREEMENT BETWEEN WENDY'S AND ELSON'S HOTEL SERVICES, INC. (HEREINAFTER REFERRED TO AS THE "ELSON'S AGREEMENT") (STIP. EX. NO. 2);

B) THE 3/5/87 SUBOPERATING AGREEMENT BETWEEN WENDY'S AND THREE NUTS, INC., (HEREINAFTER REFERRED TO AS THE "THREE NUTS AGREEMENT"). (STIP. EX. NO. 3).

C) THE 3/12/87 SUBOPERATING AGREEMENT BETWEEN WENDY'S AND KERNEL COBB'S CORNERY (HEREINAFTER REFERRED TO AS THE "KERNEL'S AGREEMENT") (STIP. EX. NO. 4).

42. PARAGRAPH 12 OF THE ELSON'S AGREEMENT (STIP. EX. NO. 2) PROVIDES AS FOLLOWS:

> SURRENDER OF PREMISES
>
> ELSON'S AGREES TO DELIVER UP AND SURRENDER TO WENDY'S POSSESSION OF THE PREMISES UPON TERMINATION OF THIS AGREEMENT, IN AS GOOD CONDITION AND REPAIR AS THE SAME SHALL BE AT THE COMMENCEMENT OF THE TERM OR MAY HAVE BEEN PUT BY WENDY'S DURING THE CONTINUANCE THEREOF, ORDINARY WEAR AND TEAR EXCEPTED. NOTHING HEREIN SHALL BE CONSTRUED AS RELIEVING SUBOPERATOR OF ANY OF ITS MAINTENANCE, REPAIR OR REPLACEMENT OBLIGATIONS UNDER THIS AGREEMENT.

43. UNDER PARAGRAPH 8 OF THE ELSON'S AGREEMENT, WENDY'S ADDITIONALLY GRANTS TO ELSON'S, "ITS AGENTS, EMPLOYEES, CUSTOMERS AND INVITEES," THE RIGHT TO USE THE COMMON AREAS OF THE HINSDALE OASIS, WHICH AREAS INCLUDED:

> ...THE WALKWAYS, HALLWAYS, ENTRANCEWAYS, INTERIOR WALLS AND WINDOWS, PASSAGEWAYS, CONCOURSES, SERVICE CORRIDORS, LOADING PLATFORMS AND TRUCK DOCKS, ELEVATORS, ESCALATORS, RAMPS AND STAIRS NOT CONTAINED WITHIN THE PREMISES, DIRECTORY SIGNS AND EQUIPMENT AND INFORMATION AND TELEPHONE

booths, public and common washrooms and service areas, lounges and shelters and any other facilities available for common use, all as they may from time to time exist at the commencement of the term thereof, and as shall be available to all the users of space in the Oasis and their employees, agents, customers, licensees and invitees.

44. Paragraph 3 of the Three Nuts Agreement (Stip. Ex. No. 3) provides, in part, as follows:

Commencement Date

...upon the effective date of this Agreement, Suboperator (Three Nuts) shall have possession of the Premises in order to begin such improvements.

45. Paragraph 15 of the Three Nuts Agreement provides as follows:

Surrender of Premises

Suboperator (Three Nuts) agrees to deliver up and surrender to Wendy's possession of the Premises upon termination of this Agreement, in as good condition and repair as the same shall be at the effective date of the term, ordinary wear and tear excepted. Nothing herein shall be construed as relieving Suboperator of any of its maintenance, repair or replacement obligations under this Agreement.

46. Pursuant to paragraph 12 of the Three Nuts Agreement, Wendy's additionally grants to Three Nuts, "its agents, employees, customers and invitees", the right to use the common areas of the Hinsdale Oasis (which areas are described below), for which right Three Nuts paid Wendy's:

...the walkways, hallways, entranceways, interior walls and windows, passageways, concourses, service corridors, loading platforms and truck docks, elevators, escalators, ramps and stairs not contained within the Premises, directory signs and equipment and information and telephone booths, public and common washrooms and service areas, lounges and shelters and any other facilities available for common use, all as they may from time to time exist at the commencement of the term thereof, and as shall be

AVAILABLE TO ALL THE USERS OF SPACE IN THE OASIS AND THEIR EMPLOYEES, AGENTS, CUSTOMERS, LICENSEES AND INVITEES. SUBOPERATOR SHALL PAY TO WENDY'S DURING THE TERM OF THIS AGREEMENT THE SUM OF TEN THOUSAND DOLLARS PER OPERATING YEAR AS SUBOPERATOR'S SHARE OF WENDY'S COST OF MAINTAINING AND OPERATING THE COMMON AREAS (THE 'CAM' CHARGE).

47. PARAGRAPH 3 OF THE KERNEL'S AGREEMENT (STIP. EX. NO. 4) PROVIDES, IN PART, AS FOLLOWS:

COMMENCEMENT DATE

...UPON THE EFFECTIVE DATE OF THIS AGREEMENT, SUBOPERATOR (KERNEL'S) SHALL HAVE POSSESSION OF THE PREMISES IN ORDER TO BEGIN SUCH IMPROVEMENTS.

48. PARAGRAPH 15 OF THE KERNEL'S AGREEMENT PROVIDES AS FOLLOWS:

SURRENDER OF PREMISES

SUBOPERATOR (KERNEL'S) AGREES TO DELIVER UP AND SURRENDER TO WENDY'S POSSESSION OF THE PREMISES UPON TERMINATION OF THIS AGREEMENT, IN AS GOOD CONDITION AND REPAIR AS THE SAME SHALL BE AT THE EFFECTIVE DATE OF THE TERM, ORDINARY WEAR AND TEAR EXCEPTED. NOTHING HEREIN SHALL BE CONSTRUED AS RELIEVING SUBOPERATOR OF ANY OF ITS MAINTENANCE, REPAIR OR REPLACEMENT OBLIGATIONS UNDER THIS AGREEMENT.

49. PURSUANT TO PARAGRAPH 12 OF THE KERNEL'S AGREEMENT, WENDY'S ADDITIONALLY GRANTS TO KERNEL'S, "ITS AGENTS, EMPLOYEES, CUSTOMERS AND INVITEES", THE RIGHT TO USE THE COMMON AREAS OF THE HINSDALE OASIS (WHICH AREAS ARE DESCRIBED BELOW), FOR WHICH KERNEL'S PAID WENDY'S.

...THE WALKWAYS, HALLWAYS, ENTRANCEWAYS, INTERIOR WALLS AND WINDOWS, PASSAGEWAYS, CONCOURSES, SERVICE CORRIDORS, LOADING PLATFORMS AND TRUCK DOCKS, ELEVATORS, ESCALATORS, RAMPS AND STAIRS NOT CONTAINED WITHIN THE PREMISES, DIRECTORY SIGNS AND EQUIPMENT AND INFORMATION AND TELEPHONE BOOTHS, PUBLIC AND COMMON WASHROOMS AND SERVICE AREAS, LOUNGES AND SHELTERS AND ANY OTHER FACILITIES AVAILABLE FOR COMMON USE, ALL AS THEY MAY FROM TIME TO TIME EXIST AT THE COMMENCEMENT OF THE TERM THEREOF, AND AS SHALL BE AVAILABLE TO ALL THE USERS OF SPACE IN THE OASIS AND THEIR EMPLOYEES, AGENTS, CUSTOMERS, LICENSEES AND INVITEES. SUBOPERATOR SHALL PAY TO WENDY'S DURING THE TERM OF THIS

AGREEMENT THE SUM OF TEN THOUSAND DOLLARS PER OPERATING YEAR AS SUBOPERATOR'S SHARE OF WENDY'S COST OF MAINTAINING AND OPERATING THE COMMON AREAS (THE 'CAM' CHARGE).

50. WITH THE APPROVAL OF EACH OF THE AGREEMENTS FOR ELSON'S, THREE NUTS', AND KERNEL'S, THE ITHA RATIFIED THAT IT GRANTED TO WENDY'S, PURSUANT TO WENDY'S OPERATING AGREEMENT, THE RIGHT TO TRANSFER WITH THE ITHA'S APPROVAL, WENDY'S RIGHT AND PRIVILEGE TO USE, POSSESS, OCCUPY, AND CONTROL THE APPLICANT'S EXEMPT LAND AND FACILITIES LOCATED ON THE HINSDALE OASIS.

51. THE ITHA APPROVED A TRANSACTION BETWEEN HOWARD JOHNSON'S AND MARRIOTT CORPORATION, WHEREIN MARRIOTT TOOK HOWARD JOHNSON'S PLACE AS THE OPERATOR OF THE LINCOLN AND O'HARE OASES RESTAURANT AREAS. (DEPT. EX. NO. 29, APPLICANT'S RESPONSE TO REQUEST TO ADMIT. NOS. 35 & 36)

52. CONCERNING THE DES PLAINES OASIS DURING THE APPLICABLE PERIOD, MCDONALD'S ASSIGNED ITS INTEREST PURSUANT TO ITS OPERATING AGREEMENT TO MARILYN AND RALPH WRIGHT, ITS FRANCHISEES AT SAID OASIS. THE ITHA HAD CONSENTED TO THIS ASSIGNMENT VIA AMENDMENT NO. 1 TO THE MCDONALD'S OPERATING AGREEMENT. (STIP. EX. NO. 7)

53. THE TERM OF THE MCDONALD'S OPERATING AGREEMENT WAS FROM SEPTEMBER 21, 1984 TO SEPTEMBER 20, 1994. (STIP. EX. NO. 5). THE TERM OF AMENDMENT NO. 1 WAS FROM MARCH 12, 1987 TO SEPTEMBER 20, 1994. (STIP. EX. NO. 7)

54. PRIOR TO THE MCDONALD'S AMENDMENT, MCDONALD'S OF ILLINOIS, AN ENTITY DISTINCT FROM MCDONALD'S, OCCUPIED THE RESTAURANT AREA LOCATED ON THE DES PLAINES OASIS, AND OPERATED THE RESTAURANT PURSUANT TO THE MCDONALD'S OPERATING AGREEMENT. (STIP. EX. NO. 8, BILL OF SALE AND ASSIGNMENT FROM MCDONALD'S OF ILLINOIS TO THE WRIGHTS)

55. THE AGREEMENTS BETWEEN MCDONALD'S AND ITS FRANCHISEES WERE NEVER SUBMITTED TO THE ITHA. (TR. P. 197)

56. THREE OUT OF THE FOUR OPERATORS IN THESE MATTERS ACTUALLY ASSIGNED ALL, OR PART OF, THEIR INTEREST IN THE POSSESSION, CONTROL, USE, AND OCCUPANCY OF THE RESPECTIVE OASES TO OTHERS WITH, OR WITHOUT, THE APPROVAL OF THE ITHA.

57. THE OPERATING AGREEMENTS GIVE THE ITHA THE RIGHT TO APPROVE A NUMBER OF THE OPERATOR'S ACTIVITIES, WHILE THEY ARE CONDUCTING THEIR BUSINESS ON THE ITHA'S LAND. MANY OF THESE RIGHTS OF APPROVAL CONCERN THE ITHA'S EXERCISE OF ITS STATUTORY DUTY TO PROTECT THE WELFARE OF PERSONS TRAVELING ON THE TOLL HIGHWAYS. (605 ILCS 10/1)

58. THE ITHA HAS THE RIGHT TO APPROVE THE INSTALLATION OF THE OPERATOR'S SIGNS. (TR. PP. 115 & 116)

59. THE ITHA HAS THE RIGHT TO APPROVE THE OPERATOR'S MENU, AND THE PRICES AN OPERATOR MAY CHARGE FOR ITEMS. (TR. P. 117)

60. THE ITHA HAS THE RIGHT TO CONTROL AN OPERATOR'S HOURS OF OPERATION. (TR. P. 118)

61. THE ITHA DEEMED THAT THE AREAS WITHIN AN OPERATOR'S CONTROL INCLUDE THE RESTAURANT AREA, THE BASEMENT AREA, THE FOOD STORAGE AREA, THE KITCHEN, THE DUMPSTER AREA, THE EXTERIOR AREA, THE RESTROOM AREAS, AND GENERALLY ANY AREA USED BY THE PUBLIC. (TR. P. 84)

62. EACH OPERATING AGREEMENT HAS A PROVISION WHICH STATES:

> <u>CONCURRENT USE</u>
>
> AUTHORITY RESERVES THE RIGHT, AT ITS SOLE DISCRETION, TO USE ANY PORTION OF ANY RESTAURANT [OR SERVICE STATION] BUILDING NOT REGULARLY USED BY OPERATOR FOR ANY PURPOSE WHICH AUTHORITY DEEMS TO BE IN THE PUBLIC INTEREST, SO LONG AS USE DOES NOT INTERFERE WITH OR COMPETE WITH THE OPERATOR'S APPROVED OPERATIONS. (STIP. EX. NO. 1, WENDY'S O/A, PARA. 29;

STIP. EX. NO. 5, MCDONALD'S O/A, PARA. 29; STIP. EX. NO. 12, HOWARD JOHNSON'S O/A, PARA. 29; STIP. EX. NOS. 15, 16 & 17, MOBIL O/A, PARA. 30) (DEPT. PROP. FINDING NO. 78)

63. THE CONCURRENT USE PROVISION OF EACH OPERATING AGREEMENT CONTRACTUALLY LIMITS THE ITHA'S ABILITY TO USE THE RESTAURANT OR SERVICE STATION BUILDINGS LOCATED ON THE RESPECTIVE OASES. PURSUANT TO THAT PROVISION, THE ITHA AGREES TO LIMIT ITS USE OF THE BUILDINGS TO THOSE PORTIONS NOT REGULARLY USED BY THE OPERATORS AND THEN, ONLY IF IT'S USE DOES NOT INTERFERE OR COMPETE WITH THE OPERATOR'S BUSINESS. ID.

64. THE ITHA IS NOT AUTHORIZED BY STATUTE TO CONDUCT BUSINESS AS A RESTAURANT OR AS A SERVICE STATION. 605 ILCS 10/8. RATHER, THE APPLICANT IS AUTHORIZED BY STATUTE TO CONTRACT WITH OTHERS TO PROVIDE THOSE SERVICES. (STIP. EX. NO. 60, PARA. 11)

65. WHAT THE APPLICANT HAS TO OFFER TO THE OPERATORS IN THESE CONSOLIDATED MATTERS IS THE LAND, BUILDINGS, STRUCTURES, AND OTHER IMPROVEMENTS LOCATED ON THE RESPECTIVE OASES, AND ALL RIGHTS AND PRIVILEGES PERTAINING THERETO. SEE 35 ILCS 205/1 (DEFINITION OF PROPERTY; REAL PROPERTY; REAL ESTATE; LAND; TRACT; LOT). IN THE COLLECTIVE OPERATING AGREEMENTS, THE APPLICANT HAS GRANTED TO THE OPERATORS, FOR A TERM OF YEARS, SOME OF THE RIGHTS THE APPLICANT OWNS, NAMELY, THE RIGHTS TO USE, POSSESS, AND OCCUPY THE LAND, BUILDINGS, STRUCTURES AND IMPROVEMENTS LOCATED ON THE EXEMPT OASES PARCELS, AND THE RIGHT TO TRANSFER SUCH RIGHTS TO OTHERS, WITH THE APPLICANT'S CONSENT. (DEPT. PROP. FINDING NO. 85)

66. MCDONALD'S HAS ENTERED INTO LEASES IN CERTAIN SITUATIONS, WHEREIN THE LANDLORD HAS CONTROL OF THE SIZE AND USE OF SIGNS FOR AESTHETIC OR ZONING REASONS. (TR. P. 215). MCDONALD'S LEASES MAY INCLUDE A PROVISION LIKE PARAGRAPH 14(F) OF THE OPERATING AGREEMENT, CONCERNING GARBAGE REMOVAL, AND/OR A PROVISION LIKE PARAGRAPH 16 OF THE OPERATING

AGREEMENT, CONCERNING MAKING BOOKS AND RECORDS AVAILABLE WHERE THE RENT IS CALCULATED ON A PERCENTAGE OF SALES BASIS. (TR. P. 216)

67. THE OPERATING AGREEMENTS AT ISSUE TRANSFERRED THE POSSESSION, OCCUPANCY AND USE OF A DEFINED AREA OF REAL PROPERTY AND THE BUILDINGS THEREON, FOR A DEFINED TERM IN EXCHANGE FOR WHICH THE OPERATORS PAID A GUARANTEED SUM PLUS A PERCENTAGE OF SALES AS RENT.

68. THE OPERATING AGREEMENTS WERE NOT TRANSFERS OF THE POSSESSION, OCCUPANCY, AND USE OF PROPERTY EXCLUSIVELY TO A SPECIFIC ENTITY, BUT WERE ASSIGNABLE WITH THE CONSENT OF THE APPLICANT. THREE OF THE FOUR OPERATING AGREEMENTS WERE IN FACT ASSIGNED.

69. THE DEPARTMENT BECAME AWARE THAT THE OPERATORS HAD ASSIGNED SOME, OR ALL, OF THEIR RIGHTS PURSUANT TO THE OPERATING AGREEMENTS AS A RESULT OF THREE OF THE INVESTIGATION REPORTS FILED BY THE COOK COUNTY BOARD OF APPEALS' FIELD INVESTIGATORS (DEPT. GRP. EX. 12, ITEM 12.8 (HINSDALE OASIS, 1990); DEPT. GRP. EX. 13, ITEM 13.8 (ABRAHAM LINCOLN OASIS, 1990); AND DEPT. GRP. EX. 22, ITEM 22.7 (HINSDALE OASIS, 1992))

70. PURSUANT TO ORDERS ISSUED IN THESE MATTERS ON DECEMBER 5, 1994, AND AGAIN ON DECEMBER 22, 1994, THE ITHA PRODUCED COPIES OF ALL AGREEMENTS CONCERNING THE OCCUPANCY OF THESE PARCELS BY ANY INDIVIDUAL, PARTNERSHIP, OR CORPORATION, OTHER THAN THE OPERATORS, DURING THE 1988 THROUGH 1992 ASSESSMENT YEARS.

71. ALL OF THE OPERATORS AND SUBOPERATORS ARE FOR-PROFIT ENTITIES, AND THE OPERATING AGREEMENTS AND SUBOPERATING AGREEMENTS CONTEMPLATE THAT THOSE ENTITIES WILL MAKE A PROFIT.

72. THE OPERATING AGREEMENTS IN THIS CASE CONTAIN DEFINITE AGREEMENTS AS TO THE EXTENT AND BOUNDS OF THE PROPERTIES IN QUESTION.

73. THE OPERATING AGREEMENTS SPECIFY A DEFINITE TERM, AND CONTAIN A SPECIFIC TERMINATION DATE.

74. EACH OF THE OPERATING AGREEMENTS CONTAIN A DEFINITE RENTAL AMOUNT AND METHOD OF PAYMENT.

75. THE OPERATING AGREEMENTS TRANSFER THE USE, OCCUPANCY, AND CONTROL OF THE BUILDINGS AND IMPROVEMENTS LOCATED ON THESE EXEMPT OASIS PARCELS AND THE RIGHT TO ASSIGN SAID RIGHTS TO OTHERS.

CONCLUSIONS OF LAW:

ARTICLE IX; SECTION 6, OF THE ILLINOIS CONSTITUTION OF 1970 PROVIDES, IN PART, AS FOLLOWS:

> THE GENERAL ASSEMBLY BY LAW MAY EXEMPT FROM TAXATION ONLY THE PROPERTY OF THE STATE, UNITS OF LOCAL GOVERNMENT AND SCHOOL DISTRICTS AND PROPERTY USED EXCLUSIVELY FOR AGRICULTURAL AND HORTICULTURAL SOCIETIES, AND FOR SCHOOL, RELIGIOUS, CEMETERY AND CHARITABLE PURPOSES.

605 ILCS 10/22 (FORMERLY ILL. REV. STAT., CH. 121, PARA. 100-22), PROVIDES AS FOLLOWS:

> ALL PROPERTY BELONGING TO THE AUTHORITY, AND THE TOLL HIGHWAYS, SHALL BE EXEMPT FROM TAXATION. HOWEVER, SUCH PART OF THAT PROPERTY AS HAS HERETOFORE BEEN OR SHALL HEREAFTER BE LEASED BY THE AUTHORITY TO A PRIVATE INDIVIDUAL, ASSOCIATION OR CORPORATION FOR A USE WHICH IS NOT EXEMPTED FROM TAXATION UNDER SECTION 19 OF THE REVENUE ACT OF 1939, IS SUBJECT TO TAXATION AS PROVIDED IN SECTION 26 OF THE REVENUE ACT OF 1939, REGARDLESS OF ANY PROVISION IN SUCH A LEASE TO THE CONTRARY.

THE LANGUAGE OF THE FOREGOING PROVISION OF THE TOLL HIGHWAY ACT REMAINED UNCHANGED DURING THE 1988 THROUGH 1992 ASSESSMENT YEARS.

35 ILCS 205/26 (FORMERLY ILL. REV. STAT., CH. 120, PARA. 507), PROVIDES AS FOLLOWS:

> EXCEPT AS PROVIDED IN SECTION 19.5 OF THIS ACT, WHEN REAL ESTATE WHICH IS EXEMPT FROM TAXATION IS LEASED TO ANOTHER

> whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, as real estate.

The language of the foregoing provision of the Revenue Act of 1939, remained unchanged during the 1988 through 1992 assessment years.

35 ILCS 205/19.5 (formerly Ill. Rev. Stat., ch. 120, para. 500.5), provides as follows:

> All property of every kind belonging to the State of Illinois.
>
> However, the State agency holding title shall file the certificate of ownership and use required by Section 19 of this Act, together with a copy of any written lease or agreement with respect to parcels of land of 1 acre or more in effect on March 30 of the assessment year, or, if none, an explanation of the terms of any oral agreement under which the property is leased, subleased or rented in parcels of 1 or more acres.
>
> Such property shall be assessed to the lessee and the taxes thereon extended and billed to the lessee, and collected in the same manner as property which is not exempt, and the lessee shall be liable for such amount and no lien shall attach to the property to the State. For the purposes of this Section, leases shall include licenses, franchises, operating agreements and other arrangements under which private individuals, associations or corporations are granted the right to use property of the Illinois State Toll Highway Authority <u>and shall include all such property without regard to the size of the leased parcel</u>.

* * *

> This amendatory Act of 1989 is a clarification of existing law and shall not be considered as a change in the law.

The underlined portion of the foregoing provision of the Revenue Act was added by Public Act 86-413, which became effective January 1, 1990. Otherwise, the language of this provision remained unchanged during the 1988 through 1992 assessment years.

The foregoing citations from the Toll Highway Act and the Revenue Act make it manifest that the General Assembly, pursuant to its

AUTHORITY UNDER ARTICLE IX, SECTION 6, OF THE ILLINOIS CONSTITUTION OF 1970, INTENDS TO EXEMPT THE PROPERTY OWNED BY THE APPLICANT, BUT TO TAX THE INTERESTS OF THE FOR-PROFIT OPERATORS PROVIDING FOOD AND FUEL SERVICES TO THE MEMBERS OF THE TRAVELING PUBLIC USING THE TOLL HIGHWAY SYSTEM.

IT IS WELL SETTLED IN ILLINOIS, THAT WHEN A STATUTE PURPORTS TO GRANT AN EXEMPTION FROM TAXATION, THE FUNDAMENTAL RULE OF CONSTRUCTION IS THAT A TAX EXEMPTION PROVISION IS TO BE CONSTRUED STRICTLY AGAINST THE ONE WHO ASSERTS THE CLAIM OF EXEMPTION. INTERNATIONAL COLLEGE OF SURGEONS V. BRENZA, 8 ILL.2D 141 (1956); MILWARD V. PASCHEN, 16 ILL.2D 302 (1959); COOK COUNTY COLLECTOR V. NATIONAL COLLEGE OF EDUCATION, 41 ILL.APP.3D 633 (1ST DIST. 1976). WHENEVER DOUBT ARISES, IT IS TO BE RESOLVED AGAINST EXEMPTION, AND IN FAVOR OF TAXATION. PEOPLE EX REL. GOODMAN V. UNIVERSITY OF ILLINOIS FOUNDATION, 388 ILL. 363 (1944); PEOPLE EX REL. LLOYD V. UNIVERSITY OF ILLINOIS, 357 ILL. 369 (1934). FINALLY, IN ASCERTAINING WHETHER OR NOT A PROPERTY IS STATUTORILY TAX EXEMPT, THE BURDEN OF ESTABLISHING THE RIGHT TO THE EXEMPTION IS ON THE ONE WHO CLAIMS THE EXEMPTION. MACMURRAY COLLEGE V. WRIGHT, 38 ILL.2D 272 (1967); GIRL SCOUTS OF DUPAGE COUNTY COUNCIL, INC. V. DEPARTMENT OF REVENUE, 189 ILL.APP.3D 858 (2ND DIST. 1989); BOARD OF CERTIFIED SAFETY PROFESSIONALS V. JOHNSON, 112 ILL.2D 542 (1986).

CONSEQUENTLY, THE COURTS HAVE MADE IT CLEAR THAT THE BURDEN OF PROOF THAT REAL PROPERTY, OR AN INTEREST THEREIN, QUALIFIES FOR EXEMPTION IS ON, AND REMAINS IN, THE PARTY SEEKING THE EXEMPTION.

BASED ON THE ESTABLISHED FACTS OF THIS CASE, I CONCLUDE AS A MATTER OF LAW, THAT THE APPLICANT OWNED THE SUBJECT PARCELS AND THE BUILDINGS AND PARKING LOTS LOCATED THEREON, DURING THE 1988 THROUGH 1992 ASSESSMENT YEARS. HOWEVER, AS NOTED ABOVE, SECTION 19.5 OF THE REVENUE ACT PERMITS, IN CERTAIN INSTANCES, THE ASSESSMENT OF PROPERTY

NOTWITHSTANDING ITS OWNERSHIP BY THE STATE. 35 ILCS 205/19.5. AT ALL PERTINENT TIMES, THE STATUTE CLEARLY MANDATED THAT STATE PROPERTY LEASED TO CERTAIN ENTITIES "SHALL BE ASSESSED TO THE LESSEE AND THE TAX THEREON EXTENDED AND BILLED TO THE LESSEE...." ID. THE STATUTE FURTHER DEFINES LEASES AS INCLUDING "LICENSES, FRANCHISES, OPERATING AGREEMENTS AND OTHER ARRANGEMENTS UNDER WHICH PRIVATE INDIVIDUALS, ASSOCIATIONS OR CORPORATIONS ARE GRANTED THE RIGHT TO USE PROPERTY OF THE ILLINOIS STATE TOLL HIGHWAY...." ID. (EMPHASIS ADDED)

THE DETERMINATION OF WHETHER CONTRACTUAL AGREEMENTS SUCH AS THE OPERATING AGREEMENTS ARE LEASES OR LICENSES, IS MADE NOT FROM THE LANGUAGE USED IN THE DOCUMENTS, BUT FROM THE LEGAL EFFECT OF THEIR PROVISIONS. JACKSON PARK YACHT CLUB V. DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS, 93 ILL.APP.3D 542 (1ST DIST. 1981); IN RE APPLICATION OF ROSEWELL V. THE CITY OF CHICAGO, 69 ILL.APP.3D 996 (1ST DIST. 1979); STEVENS V. ROSEWELL, 170 ILL.APP.3D 58 (1ST DIST. 1988).

THE ESSENTIAL ELEMENTS OF A LEASE INCLUDE: A DEFINITE AGREEMENT AS TO THE EXTENT AND BOUNDS OF THE PROPERTY; A DEFINITE AND AGREED TERM; AND A DEFINITE AND AGREED RENTAL PRICE AND MANNER OF PAYMENT. PEOPLE V. CHICAGO METRO CAR RENTALS, INC., 72 ILL.APP.3D 628 (1ST DIST. 1979); STEVENS V. ROSEWELL, 170 ILL.APP.3D 58 (1ST DIST. 1988); JACKSON PARK YACHT CLUB V. DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS, 93 ILL.APP.3D 542 (1ST DIST. 1981).

THE BOUNDARIES OF EACH OASIS OVER WHICH THE OPERATORS HAVE CONTROL ARE SPECIFICALLY IDENTIFIED IN THE EXHIBITS ATTACHED TO THE OPERATING AGREEMENTS AS SET FORTH IN MY FINDINGS OF FACT. IN ADDITION, THE STIPULATION OF FACTS CONTAIN THE APPLICANT'S OWN CALCULATIONS OF THE AREA CONTAINED IN EACH OASIS. CONSEQUENTLY, I CONCLUDE THAT EACH OF THE OPERATING AGREEMENTS AT ISSUE INCLUDE A DEFINITE AGREEMENT AS TO THE EXTENT AND

bounds of the property. Each of the operating agreements also includes an agreed rental price and method of payment, which in the case of the restaurant operators I have found consists of a fixed annual amount payable in monthly installment or if the operator's gross sales exceed a certain amount, a percentage of gross sales. In the case of Mobil the agreed rental price I have found consists of a net amount of cents per gallon on all motor fuel gallons delivered to each service stations at each of the oases, with a guaranteed annual minimum payment.

Further, a license is not assignable, and merely gives another the right to use a premises for a specific purpose, while the owner retains possession and control. Jackson Park Yacht Club v. Department of Local Government Affairs, 93 Ill.App.3d 542 (1st Dist. 1981); Stevens v. Rosewell, 170 Ill. App.3d 58 (1st Dist. 1988); In re Application of Rosewell v. The City of Chicago, 69 Ill.App.3d 996 (1st Dist. 1979). In contrast, the operating agreements which are the subject of this proceeding are not only assignable but were, in fact, assigned in whole, or in part, by the operators. Except for one instance, each assignment was made with the expressed consent of the ITHA. In the one situation where Marriott took over the duties, responsibilities and rights of Howard Johnson's, the ITHA ratified and consented to the assignment by posing no objection thereto after it became aware of the fact of the assignment.

While it is admitted that the Department has previously determined that various of these operating agreements were licenses and not leases,[2] it is only in these consolidated cases, pursuant to the Cook County

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[2]. I take official notice of the fact that in addition to the 1988 Cook County case concerning these same oases, the Department has issued decisions concerning other cases of the applicant. One of those cases concerned the Lake Forest oasis in Lake County. (Docket No. 85-49-111) A second case concerned the DeKalb oasis in DeKalb County. (Docket numbers 85-19-20 and -21) The third case involved the

BOARD OF APPEALS' FIELD INVESTIGATOR'S REPORTS FOR 1990 AND 1992, AND THE ORDERS OF ALJ DATED DECEMBER 5, 1994 AND AGAIN ON DECEMBER 22, 1994, ORDERING THE ITHA TO PRODUCE ALL ASSIGNMENTS AND SUBAGREEMENTS THAT IT BECAME CLEAR THAT THESE OPERATING AGREEMENTS ARE NOT ONLY ASSIGNABLE BUT WERE IN FACT ASSIGNED.

IN ADDITION, IT SHOULD BE POINTED OUT THAT BECAUSE AN ACTION FOR TAXES FOR ONE YEAR IS NOT IDENTICAL TO A CAUSE OF ACTION FOR TAXES IN SUBSEQUENT YEARS, A DECISION ADJUDICATING TAX STATUS FOR A PARTICULAR YEAR IS NOT RES JUDICATA AS TO THE STATUS OF PROPERTY IN LATER YEARS. TURNVEREIN LINCOLN V. PASCHEN, 20 ILL. 2D 229 (1960); HOPEDALE MEDICAL FOUNDATION V. COLLECTOR, 59 ILL. APP. 3D 816 (3RD DIST. 1978); JACKSON PARK YACHT CLUB V. DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS, 93 ILL. APP. 3D 542 (1ST DIST. 1981). CONSEQUENTLY, THE PREVIOUS DECISIONS BY THE DEPARTMENT CONCERNING THESE OPERATING AGREEMENTS ARE NOT CONTROLLING IN THIS MATTER.

THE ITHA AND WENDY'S, IN THEIR JOINT BRIEF, PLACE SUBSTANTIAL RELIANCE ON THE CASE, IN RE APPLICATION OF ROSEWELL, SUPRA. HOWEVER, THAT CASE IS DISTINGUISHABLE FROM THESE CONSOLIDATED PROCEEDINGS ON ITS FACTS. FIRST, WHILE THE CITY WAS LEGALLY AUTHORIZED TO OPERATE GARAGES, THE ITHA IS NOT AUTHORIZED TO OPERATE RESTAURANTS AND/OR SERVICE STATIONS, AND, MORE

BELVIDERE OASIS IN BOONE COUNTY. (DOCKET NUMBERS 85-4-10 AND -11) THE BOONE COUNTY CASE WAS APPEALED TO THE ILLINOIS APPELLATE COURT. THE COUNTY OF BOONE V. THE DEPARTMENT OF REVENUE, 215 ILL. APP.3D 45 (2ND DIST. 1991) (THE ONLY ISSUE ACTUALLY CONSIDERED BY THE COURT IN THAT CASE WAS WHETHER OR NOT THE 1987 AMENDMENT TO 1987 ILLINOIS REVISED STATUTES, CHAPTER 120, PARAGRAPH 500.5 CHANGED THE EXISTING LAW.) IN EACH OF THOSE CASES BEFORE THE DEPARTMENT, IT WAS DETERMINED, AFTER HEARING, THAT THE APPLICANT'S OPERATING AGREEMENTS WERE LICENSES. HOWEVER, THE FACTS OF RECORD IN THOSE REFERENCED CASES ARE NOT THE SAME AS THE FACTS OF RECORD HEREIN. THE APPLICANT DID NOT DISCLOSE IN ANY OF THE CITED PRIOR CASES THAT THE OPERATOR'S RIGHTS UNDER ANY OF THOSE OPERATING AGREEMENTS HAD BEEN ASSIGNED BY THE OPERATORS, NOR DID THE APPLICANT SUBMIT FOR CONSIDERATION THE ASSIGNMENTS ENTERED INTO BY THE FOR-PROFIT OPERATORS.

importantly, each of the operating agreements in these consolidated matters contains the concurrent use provision which, in effect, gives the operators exclusive control of the areas which they occupy.

Further, the City of Chicago in Rosewell provided the operators with all cash registers, parking tickets and forms and even light bulbs and fuses necessary to operate the business. In addition the operator was required to turn over all monies collected to the City, which then paid the operator a fee of approximately 4% of gross revenues. Consequently the agreement in Application of Rosewell was essentially a management agreement whereby the operator managed parking garages for the City for a nominal fee. Thus, the facts of the Rosewell case are clearly different than the facts in these consolidated matters where the operators occupied the Oasis and engaged in their own usual businesses of selling food or motor fuel for profit to the public.

Applicant also draws attention in its brief (Appl. Brief, p. 13 n. 8) to the case of Stevens v. Rosewell, 170 Ill. App.3d 58 (1st Dist. 1988) by stating that the Stevens court held that a community college entered into a lease agreement, not a license, with McDonald's, with the basis of that determination being that the college had no control over the property McDonald's was using or over the business' operation. Applicant contrasts those facts with the facts in this case wherein the operating agreements place certain conditions on the operations of the businesses involved.

It appears that the applicant, by making this observation, implies that the Stevens facts are the only facts upon which there can be a determination of whether an agreement has the legal effect of a lease or license. This, of course, is incorrect. In fact, the Stevens court cites,

with approval, the case of People v. Chicago Metro Car Rentals, Inc., 72 Ill. App.3d 626 (1st Dist. 1979). In the Metro case, the City of Chicago entered into an agreement with a car rental business (Metro) for property at O'Hare Airport. In the agreement, the City placed limitations and restrictions on the business' use of the property, including giving the City the right to approve of the rates charged by Metro, limiting the use of the property for only a certain purpose and mandating that Metro could only solicit business from the counter areas. Further, by the agreement, Metro's employees and invitees were to conduct themselves properly and the business agreed to provide good, prompt and efficient service to the public. In addition, Metro was to keep the property open for business for a "sufficient amount of time to meet reasonable demands" for its services. Id. at 628

In spite of these restrictions and conditions, the Metro court, in determining that the agreement entered into in that case was a lease, and therefore taxable, stated that "...the limitations upon use and the restrictions imposed upon the operation of the business do not affect the existence of the lease. Other agreements and conditions may be, and often are incorporated into a lease." Id. at 630; See, Stevens v. Rosewell, supra, at 64

Clearly, the facts in Metro are akin to the facts in the instant matter. Thus, that is the case upon which I place greater reliance rather than Stevens v. Rosewell.

With all the requisite factual delineators evident, I therefore reach the inescapable conclusion that pursuant to Section 22 of the Toll Highway Act (605 ILCS 10/22) and Sections 26 and 19.5 of the Revenue Act (35 ILCS 205/26 and 35 ILCS 205/19.5, respectively) the agreements between the

APPLICANT AND THE OPERATORS ARE LEASES, AND NOT LICENSES, AND CONSEQUENTLY, THE PARCELS HERE IN ISSUE ARE TAXABLE TO THE OPERATORS, NAMELY WENDY'S, MCDONALD'S, MARRIOTT, AND MOBIL, FOR THE 1988 THROUGH 1992 ASSESSMENT YEARS.

ON ITS FACE, THE PERTINENT STATUTES AND CASE LAW CONCLUDE THE CONTROVERSY HERE AND RESULT IN THE ASSESSMENT OF PROPERTY TAXES ON THE LEASEHOLD PARCELS OF REALTY HERETOFORE DESCRIBED. THE ITHA, HOWEVER, ARGUES THAT THE AMENDMENT WHICH DEFINES LEASES TO INCLUDE LICENSES, FRANCHISES AND OPERATING AGREEMENTS IS UNCONSTITUTIONAL. IN THEIR BRIEF, THE ATTORNEYS FOR THE APPLICANT AND WENDY'S, AFTER CONTENDING THAT THE OPERATING AGREEMENTS ARE LICENSES, PUT FORTH FOUR ARGUMENTS ALLEGING THAT THE FOLLOWING LANGUAGE OF SECTION 19.5 OF THE REVENUE ACT (35 ILCS 205/19.5) VIOLATED VARIOUS PROVISIONS OF THE ILLINOIS CONSTITUTION OF 1970:

> FOR THE PURPOSES OF THIS SECTION, LEASES SHALL INCLUDE LICENSES, FRANCHISES OPERATING AGREEMENTS AND OTHER ARRANGEMENTS UNDER WHICH PRIVATE INDIVIDUALS, ASSOCIATIONS OR CORPORATIONS ARE GRANTED THE RIGHT TO USE PROPERTY OF THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY AND SHALL INCLUDE ALL SUCH PROPERTY WITHOUT REGARD TO THE SIZE OF THE LEASED PARCEL.

IT IS A WELL-ESTABLISHED RULE OF LAW IN ILLINOIS THAT THE COURTS WILL NOT CONSIDER CONSTITUTIONAL ISSUES, WHERE AS HERE, THE CAUSE MAY BE DECIDED ON OTHER GROUNDS, (HOWARD V. LAWTON, 22 ILL.2D 331 (1961); OSBORN ET AL. V. THE VILLAGE OF RIVER FORREST, 21 ILL.2D 246 (1961)). THUS, I NEED NOT ADDRESS THE APPLICANT'S CONSTITUTIONAL CONCERNS SINCE I HAVE DETERMINED THE OASES TO BE LEASED. I DO SO ONLY BECAUSE THE ARGUMENTS ARE FLAWED AND WOULD FAIL EVEN WITHOUT A FINDING THAT THE DOCUMENTS ARE LEASES.

FIRST, IT SHOULD BE POINTED OUT THAT SINCE AN ADMINISTRATIVE AGENCY IS A CREATURE OF STATUTE, ANY POWER OR AUTHORITY CLAIMED BY IT, MUST FIND ITS

SOURCE WITHIN THE PROVISIONS OF THE STATUTE BY WHICH IT IS CREATED. GRANITE CITY DIVISION OF NATIONAL STEEL COMPANY ET. AL. V. THE ILLINOIS POLLUTION CONTROL BOARD, 155 ILL.2D 149 (1993); BIO-MEDICAL LABORATORIES, INC. V. TRAINOR, 68 ILL.2D 540 (1977). THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY, WHICH IS THE ONLY APPLICANT IN THIS PROCEEDING, HAS NOT PRESENTED ANY EVIDENCE THAT IT IS AUTHORIZED BY THE TOLL HIGHWAY ACT TO CHALLENGE THE CONSTITUTIONALITY OF THAT ACT, OR OF THE REVENUE ACT. CONSEQUENTLY, IT MUST BE PRESUMED THAT THE APPLICANT DOES NOT HAVE SUCH AUTHORITY.

THIS IS PARTICULARLY OF INTEREST IN LIGHT OF SECTION 22 OF THE TOLL HIGHWAY ACT (605 ILCS 10/22) WHICH, AFTER EXEMPTING THE PROPERTY OF THE ITHA FROM TAXATION, EXPRESSLY PROVIDES:

> HOWEVER, SUCH PART OF THAT PROPERTY HAS HERETOFORE BEEN OR MAY HEREAFTER BE LEASED BY THE AUTHORITY TO A PRIVATE INDIVIDUAL, ASSOCIATION OR CORPORATION FOR A USE WHICH IS NOT EXEMPTED FROM TAXATION UNDER SECTION 19 OF THE REVENUE ACT OF 1939, IS SUBJECT TO TAXATION AS PROVIDED IN SECTION 26 OF THE REVENUE ACT OF 1939, REGARDLESS OF ANY PROVISION IN SUCH A LEASE TO THE CONTRARY.

CONSEQUENTLY, APPLICANT'S ENABLING ACT EXPRESSLY PROVIDES THAT THE PROPERTY OF THE ITHA WHICH IS LEASED TO FOR-PROFIT ENTITIES IS TAXABLE, AS PROVIDED IN THE REVENUE ACT OF 1939. IT THEN IS THE REVENUE ACT, WHICH DEFINES APPLICANT'S "LEASES" TO INCLUDE "LICENSES". THUS, THE APPLICANT'S ENABLING STATUTE LIMITS ITS AUTHORITY TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 19.5 OF THE REVENUE ACT OF 1939. FURTHER, THE 1973 AMENDMENT TO SECTION 22 OF THE TOLL HIGHWAY ACT, CITED ABOVE, WAS HELD BY THE ILLINOIS SUPREME COURT TO BE CONSTITUTIONAL AFTER SAID AMENDMENT WAS ATTACKED BY THE APPLICANT. IN RE APPLICATION OF SKIDMORE, 75 ILL.2D 33 (1979)[3]

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[3]. NEVERTHELESS, AFTER ALL OF THIS, THE REAL ESTATE TAX CLAUSE OF THE OPERATING AGREEMENTS, ALL OF WHICH WERE EXECUTED IN 1984, OR IN THE CASE OF THE ORIGINAL MOBIL AGREEMENT IN 1985, BEGIN AS FOLLOWS:

NOTWITHSTANDING THE ABOVE, THE FIRST CONSTITUTIONAL ARGUMENT RAISED BY THE APPLICANT IS STATED AS FOLLOWS:

> (1) DOES SECTION 19.5 AUTHORIZE AN AD VALOREM TAX ON PERSONAL PROPERTY (I.E., LICENSES, FRANCHISES, OPERATING AGREEMENTS OR OTHER ARRANGEMENTS) IN CONTRAVENTION OF ARTICLE IX SECTION 5 OF THE ILLINOIS CONSTITUTION? (APPL. BRIEF, P. 5)

LEASES, LIKE LICENSES, ARE PERSONAL PROPERTY AT COMMON LAW. HOWEVER, THE GENERAL ASSEMBLY, EVEN AFTER THE ADOPTION OF THE ILLINOIS CONSTITUTION OF 1970, HAS BEEN DETERMINED TO HAVE THE POWER TO CLASSIFY SUCH INTERESTS AS REAL PROPERTY FOR TAX PURPOSES. APEX OIL CO. V. HENKHAUS, 118 ILL.APP.3D 273 (5TH DIST. 1983). ARTICLE IX, SECTIONS 4 AND 5 OF THE ILLINOIS CONSTITUTION OF 1970, DO NOT DEFINE "REAL PROPERTY" AND "PERSONAL PROPERTY" AS LIMITED BY THE COMMON LAW, OR OTHERWISE, BUT LEAVE TO THE GENERAL ASSEMBLY THE POWER TO ESTABLISH THE MANNER IN WHICH SUCH TAXES ARE TO BE LEVIED, AND IN THE CASE OF PERSONAL PROPERTY TAXES, ABOLISHED. PURSUANT TO ARTICLE IX SECTION 5 OF THE ILLINOIS CONSTITUTION OF 1970 THE GENERAL ASSEMBLY ENACTED 35 ILCS 205/18.1 WHICH READS IN PART AS FOLLOWS:

> NOTWITHSTANDING THE PROVISIONS OF THIS OR ANY OTHER ACT, AN AD VALOREM PERSONAL PROPERTY TAX SHALL NOT BE LEVIED AFTER JANUARY 1, 1979, ON ANY PERSONAL PROPERTY HAVING TAX SITUS IN THIS STATE, PROVIDED THAT THIS SECTION SHALL NOT PROHIBIT THE COLLECTION AFTER JANUARY 1, 1979, OF ANY TAXES LEVIED UNDER THIS ACT PRIOR TO JANUARY 1, 1979, ON PERSONAL PROPERTY

IT IS NOT PRESENTLY CONTEMPLATED BY THE PARTIES THAT ANY OF THE PREMISES WILL BE SUBJECT TO REAL PROPERTY TAXES OR THEIR EQUIVALENT. HOWEVER, IN THE EVENT THAT THE PREMISES, OR ANY PART THEREOF, OR OPERATOR'S INTEREST THEREIN, POSSESSORY OR OTHERWISE, SHALL BE MADE SUBJECT TO ANY REAL PROPERTY TAX (OF WHATEVER KIND AND HOWEVER DENOMINATED), THE AUTHORITY SHALL PAY OR DISCHARGE, OR CAUSE TO BE PAID OR DISCHARGED, SUCH TAX OR ASSESSMENT. SEE, FIND. OF FACT #38

> SUBJECT TO ASSESSMENT AND TAXATION UNDER THIS ACT PRIOR TO JANUARY 1, 1979. NO PROPERTY LAWFULLY ASSESSED AND TAXED AS PERSONAL PROPERTY UNDER THIS ACT PLACED IN USE AFTER JANUARY 1, 1979, SHALL BE CLASSIFIED AS REAL PROPERTY SUBJECT TO ASSESSMENT AND TAXATION UNDER THIS ACT AFTER JANUARY 1, 1979.

IT IS UNDISPUTED THAT LICENSES WERE NOT BEING TAXED AS PERSONAL PROPERTY PRIOR TO JANUARY 1, 1979. CONSEQUENTLY THE FOREGOING CONSTITUTIONAL AND STATUTORY PROVISIONS DO NOT APPLY.

FURTHERMORE, IT SHOULD BE POINTED OUT THAT PURSUANT TO ARTICLE IX, SECTION 7, OF THE ILLINOIS CONSTITUTION OF 1970, THE GENERAL ASSEMBLY MAY EXEMPT FROM REAL ESTATE TAX PROPERTY BELONGING TO THE STATE OF ILLINOIS. THE GENERAL ASSEMBLY, AS A RESULT OF THE PASSAGE OF PUBLIC ACT 85-974, AMENDING SECTION 19.5 OF THE REVENUE ACT, HAS ELECTED TO EXEMPT FROM REAL ESTATE TAX THE REAL PROPERTY OF APPLICANT EXCEPT FOR THOSE PORTIONS LEASED, LICENSED, OR FRANCHISED, TO ORGANIZATIONS GRANTED THE RIGHT TO USE THE PROPERTY OF APPLICANT. IN THOSE CASES, ITHA REAL ESTATE IS TO BE ASSESSED TO THE LESSEES, LICENSEES, OR FRANCHISEES OF THE ITHA AS REAL ESTATE. CONSEQUENTLY, THE TAX IN QUESTION IS NOT A TAX ON PERSONAL PROPERTY, BUT IS A TAX ON REAL ESTATE, MEASURED BY THE VALUE OF THE LEASE, LICENSE OR FRANCHISE.

AS SUCH, THIS CONSTITUTIONAL OBJECTION RAISED BY THE APPLICANT, EVEN IF THE OPERATING AGREEMENTS HAD BEEN DETERMINED TO BE LICENSES, IS WITHOUT MERIT.

THE SECOND CONSTITUTIONAL ARGUMENT RAISED BY THE APPLICANT IS STATED AS FOLLOWS:

> (2) DOES SECTION 19.5 FAIL TO SPECIFY A METHOD BY WHICH THE ITEMS INCLUDED UNDER THE DEFINITION OF "LEASES" ARE TO BE VALUED IN VIOLATION OF ARTICLE IX, SECTION 4 OF THE ILLINOIS CONSTITUTION? (APPL. BRIEF, P. 6)

THE SOLE ISSUE INVOLVED IN THESE CONSOLIDATED PROCEEDINGS IS WHETHER OR NOT THE PARCELS AT ISSUE QUALIFY FOR EXEMPTION FROM REAL ESTATE TAXES FOR THE 1988 THROUGH 1992 ASSESSMENT YEARS, PURSUANT TO SECTION 119 OF THE REVENUE ACT. 35 ILCS 205/119. THE DEPARTMENT ONLY HAS JURISDICTION TO REVIEW AND MAKE THE FINAL DECISION CONCERNING SUCH EXEMPTION REQUESTS, PURSUANT TO SAID SECTION 119. ISSUES CONCERNING THE METHOD OF VALUATION OF PROPERTY ARE TO BE RAISED IN SEPARATE ASSESSMENT PROCEEDINGS, PURSUANT TO SECTION 116 OF THE REVENUE ACT. 35 ILCS 205/116 CONSEQUENTLY, THIS SECOND CONSTITUTIONAL ARGUMENT IS NOT RELEVANT TO THESE CONSOLIDATED PROCEEDINGS, WHICH ARE ONLY CONCERNED WITH WHETHER OR NOT THE PARCELS HERE IN ISSUE QUALIFY FOR EXEMPTION DURING THE 1988 THROUGH 1992 ASSESSMENT YEARS. IT IS ALSO POINTED OUT THAT "LICENSES" ARE INCLUDED IN THE DEFINITION OF "LEASES" PURSUANT TO SECTION 19.5 OF THE REVENUE ACT (35 ILCS 205/19.5) AND LEASEHOLD INTERESTS ARE ASSESSED, PURSUANT TO SECTION 20(2) OF THE REVENUE ACT OF 1939. 35 ILCS 205/20(2) CONSEQUENTLY, THIS CONSTITUTIONAL OBJECTION RAISED BY THE APPLICANT IS WITHOUT MERIT.

THE APPLICANT RAISES THE FOLLOWING THIRD CONSTITUTIONAL AGREEMENT:

> (3) DOES SECTION 19.5 IMPAIR THE CONTRACTUAL RIGHTS OF HOLDERS OF TOLLWAY BONDS IN CONTRAVENTION OF ARTICLE I, SECTIONS 10 AND 16 OF THE ILLINOIS CONSTITUTION? (APPL. BRIEF, P. 6)

ASSUMING, ARGUENDO, THAT THE ITHA HAS STANDING TO RAISE A QUESTION ON THE RIGHTS OF BONDHOLDERS, THIS ISSUE WAS PREVIOUSLY RAISED BY THIS VERY APPLICANT IN IN RE APPLICATION OF SKIDMORE, 75 ILL.2D 33 (1979). THE SUPREME COURT, IN THAT CASE, RESOLVED IN FAVOR OF TAXATION THE PRECISE IMPAIRMENT OF CONTRACTS ISSUE RAISED HERE.

In addition, the fact that the applicant has contractually agreed to pay these taxes does not make the Revenue Act a statute which impairs the revenue obligations to it bondholders. The responsibility for any such impairment falls on the ITHA, which pursuant to the operating agreements, has volunteered to pay real estate taxes which it is not legally obligated to pay. See, ftnt. 3, supra

The last constitutional argument raised is stated in the applicant's brief as follows:

> (4) Does Section 19.5 violate the proscription against special legislation under Article IV, Section 13 and the guarantees of equal protection to all persons under Article I, Section 2 of the Illinois Constitution and the Fourteenth Amendment to the United States Constitution. (Appl. Brief, p. 6)

First, with regard to the equal protection argument, it is noted that the ITHA is a state agency, and as such is not a "person" to be guaranteed the right of equal protection by the Illinois Constitution of 1970 or the 14th Amendment to the U.S. Constitution. City of Evanston v. RTA, 202 Ill. App.3d 265 (1st Dist. 1990)

With regard to Wendy's and the other operators, a statutory classification for purposes of taxation can withstand a constitutional equal protection attack, so long as the classification is reasonable. Nabisco v. Korzen, 68 Ill.2d 451 (1977). Classifications not based on suspect categories are examined using the rational basis test. If there was a rational basis for the action of the General Assembly, the classification will be upheld. Cutinello v. Whitley, 161 Ill.2d 409 (1994).

Pursuant to both Sections 26 and 19.5 of the Revenue Act (35 ILCS 205/26 and 35 ILCS 205/19.5, respectively), the General Assembly has,

generally, provided for the taxation of the leasehold interests in property where the ownership interest was exempt. There are several rational bases for the General Assembly to include within the Section 19.5 of the Revenue Act definition of taxable leases, "licenses, franchises, operating agreements and other arrangements under which private individuals, associations or corporations are granted the right to use property of the Illinois State Toll Highway Authority." By defining leases in that manner, the General Assembly obviously attempts to stop, as it has tried in the past pursuant to 605 ILCS 10/22, a State agency which is seemingly intent on paying, with public funds, the property taxes of for-profit entities which conduct their businesses on the applicant's exempt land. It also attempts to halt repeated challenges to the General Assembly's clear intent to tax agreements pursuant to which businesses are granted the right to use exempt property for profit.[4]

Further reason for the propriety of such taxation is clear in this case since the ITHA has a statutory obligation to provide for the safety and comfort of the travelers both interstate and intrastate using its various owned highway facilities. 605 ILCS 10/1 This obligation is fulfilled by contracting with the operators to provide the food and fuel necessary to provide for the traveling public's safety and comfort, using the oases facilities. This gives the for-profit operators the opportunity to provide their products and services to a captive audience, the traveling public. It is clear that the General Assembly intended by Section 19.5 of the Revenue Act (35 ILCS 205/19.5) that the local taxing districts, including school districts and municipalities which are seriously effected by the exemption

4. I am unaware of any other State agency titleholder which grants to others the right to use its exempt property for profit and so actively attempts to defeat both the assessment and collection of taxes on that property.

of property, receive some property tax benefits from the use of these oases by the for-profit operators.[5] There is no question that if the various operators owned this property and used it to sell their products for profit to the public, the property would be taxable.

Consequently, the legislature had several rational bases for including within the definition of taxable leases "licenses, franchises, operating agreements and other arrangements under which private individuals, associations, or corporations are granted the right to use property of the Illinois State Toll Highway Authority." Therefore, such a classification qualifies as being a reasonable classification.

It is therefore concluded, as a matter of law, that the operating agreements here in issue are leases. It is further concluded that pursuant to Section 22 of the Toll Highway Act (605 ILCS 10/22), said leaseholds are properly assessable to the for-profit operators thereof, namely, Mobil, Wendy's, McDonald's and Marriott for the 1988 through 1992 assessment years.

I therefore recommend that the leasehold parcels listed on the first page of this Notice of Decision remain on the tax rolls for the 1988 through 1992 assessment years, as evidenced by the various Department docket numbers listed on said Notice of Decision.

I further recommend that said Cook County leasehold parcels be assessed to the various operators in proportion to their occupancy of said parcels.

Respectfully submitted,

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5. A review of the list of intervenors in these proceedings makes it clear that the municipalities and school districts in which the oases at issue are located have a vital interest in the outcome of these consolidated proceedings.

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GEORGE H. NAFZIGER
ADMINISTRATIVE LAW JUDGE
JANUARY 18, 1996